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In the Supreme Court of the United States

October Term, 1927

No. 33,304

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THE STATE HIGHWAY COMMISSION OF WYOMING, CONSISTING OF HYRAM LINGLE, T. D. O'NEIL, S. W. CONWELL, J. M. SNYDER and ROY SENEY,

Petitioner,

vs.

UTAH CONSTRUCTION COMPANY, a Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONER

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WYOMING LABOR JOURNAL, CHEYENNE

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN BEHALF OF PETITIONER

Introduction

This case is before this Honorable Court on Writ of Certiorari to the Circuit Court of Appeals of the Eighth Circuit. The opinion of the District Court will be found at Page 115 of the Record and is reported in 16 Federal Reporter, (Second Series) at Page 322. The opinion of the Circuit Court of Appeals will be found at Page 126 of the Record and is reported in 23 Federal Reporter, (Second Series) at Page 638.

Grounds On Which the Jurisdiction of This Court Is Invoked

The sole and only question involved in this case is whether under the United States Constitution and the Federal Judiciary Act, the United States District Court for the District of Wyoming has jurisdiction to hear and decide the issues involved in this action. Petitioner contends that this is in reality an action against the sovereign State of Wyoming and therefore the federal courts are without jurisdiction, while respondent contends that the action is against the State Highway Commission of Wyoming, which it claims is a separate and distinct entity created by the State and that, therefore, the federal courts have jurisdiction. These matters appear more fully in the Statement of the Case, which immediately follows.

Statement of the Case

In order that the Court may have a clear understanding of the questions involved, petitioner will set forth, (1) Those provisions of the Constitution and Statutes of the State of Wyoming which are applicable to the case at bar, (2) a statement of the facts as shown by the pleadings, and (3) a review of the litigation in this case.

Constitutional Provisions and Statutes of the State of Wyoming Involved in This Action.

Prior to 1916, the State of Wyoming could not engage in any work of internal improvement unless authorized so to do by a two-thirds vote of the people. In that year a new section was added to Article XVI of the Constitution, which reads as follows:

> "Sec. 9. State highway construction. The provision of Section 6 of Article XVI of this constitution prohibiting the state from engaging in any work of internal improvement unless authorized by a two-thirds vote of the people shall not apply to or affect the construction or improvement of public roads and highways; but the legislature shall have power to provide for the construction and improvement of public roads and highways in whole or in part by the state, either directly or by extending aid to counties."

In the year 1919, in order to render effective this amendment to the Constitution, the Wyoming Legislature passed an Act known as the State Highway Act. (Session Laws of Wyoming, 1919, Chapter 132.) Said law has been in force ever since its passage and now appears as Sections 3025-3037 of the Wyoming Compiled Statutes, 1920, with the exception that Section 3025 was amended by the Legislature of 1927. (Chapter 61, Sec. 1, of the Session Laws of Wyoming, 1927.) The material portions of said State Highway Act, including the 1927 amendment, are set forth in full in the appendix to this brief.

Said State Highway Act contains the following provisions:

(1) For the creation of a "State Highway Department to consist of a State Highway Commission and a State Highway Superintendent";

(2) That the "State Highway Commission shall consist of five State Highway Commissioners, who shall be appointed by the Governor with the advice and consent of the Senate";

(3) That the "Commission shall have the power to sue in the name of the State Highway Commission of Wyoming, and may be sued by such name in any court upon any contract executed by it";

(4) That the Attorney General shall be the legal adviser of said Commission;

(5) That the Commission shall maintain offices in the State Capitol Building in charge of the State Highway Superintendent;

(6) *That there shall be created a "State Highway Fund", in the possession and under the control of the State Treasurer, who shall place to its credit all moneys paid to the State of Wyoming by the United States to assist in the building of public highways, all moneys received from the sale of State bonds for highway construction or improvement, all moneys derived from State taxes levied for highway purposes,* etc.;

(7) *That the moneys in said State Highway Fund shall not be paid out except by warrants issued by the State Auditor on vouchers approved by the State Highway Superintendent;*

(8) *That the title to the lands over which any State Highway may be built,* including the road-bed and right-of-way, *shall vest in the State of Wyoming;* and,

(9) That *the construction and maintenance of all State Highways,* including bridges and culverts thereon, *shall be performed at the expense of the State* and by and under the supervision of the Commission and the State Highway Superintendent.

The Act also appropriated a certain sum out of the general funds in the State Treasury for carrying on the work of construction of State highways under the provisions of said Act, and additional sums have been appropriated by each succeeding Legislature.

In 1927 the Legislature amended Section 3025 of the Statutes so that it now provides that the State Highway Commission may be sued in the Courts of the State of Wyoming and in no other jurisdiction upon its contracts.

In connection with the provisions of Section 3034, supra, we also deem it best at this point to call the Court's attention to parts of Sections 118, 131 and 132 of the Wyoming Compiled Statutes of 1920, which have a material bearing upon this case. These are set forth in full in the Appendix. They make it the duty of the State Auditor to audit all claims to be paid out of moneys in the State Treasury and to draw all warrants upon the State Treasurer for money. Section 132 makes it a felony for the State Treasurer to pay out any state funds except on warrants drawn by the State Auditor.

The Legislature of 1919 also made provision for the issuance of bonds of the State of Wyoming to aid in the building of State Highways. (See Session Laws of Wyoming, 1919, Chapter 82.) These are now Sections 3020-3024 of the Wyoming Compiled Statutes, 1920. The material portions thereof are as follows:

> Section 3020. "For the purpose of providing funds for the construction and improvement of public roads and highways in Wyoming, the state treas-

urer, with the approval of the governor is hereby authorized from time to time within the limits of the amount authorized by law to issue and dispose of bonds of the State of Wyoming to be designated as highway bonds."

Section 3021. "Such bonds shall bear date and may be issued in such amounts and bearing such rates of interest * * * as shall be determined by the governor and state treasurer." * * * They "shall be signed by the governor and attested by the secretary of state under the seal of the state and countersigned by the state treasurer." * * * "The bonds shall be deposited until sold with the state treasurer, *and when sold the proceeds of such bonds shall be paid into the state treasury and be kept in a separate fund which shall be known as the State Highway Fund.*"

While these Statutes were in full force and effect the State Highway Department, in the spring of 1922, determined to construct a State Highway through the Wind River Canyon in Fremont and Hot Springs Counties, Wyoming. Said Highway was to be built in co-operation with the United States Government, and is designated in the advertisement for bids and in the contract sued on in this action as the "Wind River Canyon Road State Highway",—"Federal Aid Project No. 118". Bids were called for, and the respondent. Utah Construction Company, being the lowest bidder for the construction of Sections B, C and D of said State Highway, its bid was accepted. (R. 66, 68, 70.)

Thereafter, on June 1st, 1922, a contract was entered into with the Utah Construction Company for the building of said highway. A copy of this contract is annexed to plaintiff's petition, and appears on Pages 71 to 75 of the

Record. We will call attention to some of its most significant provisions.

The first paragraph reads as follows:

> "This Agreement, made and entered into this 1st day of June, 1922, between *the State of Wyoming,* acting through the State Highway Commission, and Utah Construction Company, a corporation, of Ogden, in the State of Utah, hereinafter called the contractor." (R. 71)

It was further provided that the road to be built under said contract was a portion of the Wind River Canyon Road State Highway; that the work was to be done to the satisfaction of the State Highway Engineer; that when the work of building said road had been completed the *State of Wyoming should pay,* and the contractor should receive, as full compensation for everything furnished and done under the contract the unit prices stipulated in the proposal; and that in the event of a breach of the contract by the contractor, it should pay to *the State of Wyoming* a certain amount as liquidated damages. The contract also contains many other provisions showing that the State of Wyoming is a party thereto. The testimonium clause is as follows:

> "In Witness Whereof, *The State of Wyoming,* acting through *its* State Highway Commission, *party of the first part,* has caused these presents to be executed by its Superintendent and the seal thereof to be hereunto affixed, on the day and year first above written; and the said party of the second part, has caused these presents to be executed and has hereunto affixed his hand and seal the 3rd day of June, A. D. 1922." (R. 74)

It was further provided in said contract that the advertisement for bids, proposals, plans, specifications, etc. should be considered as a part of said contract, and these latter also contain many provisions showing that the State of Wyoming is the real party in interest and the party that was building said road. (R. 14, 26, 67, 69, 71, etc.)

After the above contract had been duly executed by the parties thereto, the respondent, Utah Construction Company, began the work of building said State Highway, and in due time completed the same. In December, 1922, a supplemental agreement was entered into. (R. 75) This supplemental agreement is very short, and provides for certain changes in grades and alignments, and for the doing of a large amount of additional excavation, tunnel work, etc. at the unit prices mentioned in the original contract. It also provides for an extension of time within which to complete the work. *But said supplemental agreement does not in any way change, alter or modify any of the provisions of the original contract referred to in the preceding paragraphs.*

During the progress of the work the Utah Construction Company, in accordance with the provisions of the Statute hereinbefore referred to, filed each month its sworn vouchers for work done, which were approved by the State Highway Superintendent. Warrants were drawn by the State Auditor for the amount of these vouchers, and these warrants were paid by the State Treasurer out of moneys in the State Highway Fund.

After said highway had been completed, the parties being unable to agree on the amount due under the contract, on May 13, 1925, the Utah Construction Company filed in the United States District Court for the District of Wyoming its petition naming the State Highway Commission of Wyoming as defendant. In its first cause of action it

sought to recover the sum of $456,053.93, which it alleged to be due as damages for an alleged breach of said contract; and in its second cause of action it sought to recover the sum of $88,773.81, which it alleged to be remaining due and unpaid on estimates given by the State Highway Engineer for work done and performed under said contract. (R. 3-13)

In said petition it is alleged that the matter and amount in controversy exceeds the sum and value of $3,000.00; that the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Utah and "was and is a citizen and resident of the State of Utah", and then further alleges as the basis of its claim for the jurisdiction of the federal court,

> "That the said Hyram Lingle, G. D. O'Neil, S. W. Conwell, J. M. Snyder and Roy Seney are respectively the duly appointed, qualified and acting Highway Commissioners of the State of Wyoming, and that collectively the said persons above named constitute the State Highway Commission of Wyoming with power to sue and be sued under the provisions of the statute of Wyoming in such case made and provided. That the said persons constituting the said State Highway Commission of Wyoming, and the said Commission is each a resident and citizen of the State of Wyoming." (R. 3)

While the State Highway Commission is named as the defendant in said petition, there is not a single allegation in the petition to show that said commission had ever agreed to do a single thing, or that it had ever agreed to pay the plaintiff anything, or that it had in any way done anything to injure, wrong or defraud the plaintiff. In fact, the petition plainly states that the State of Wyoming is the party

who agreed to pay plaintiff for the building of said highway. (R. 5)

The defendant first by demurrer (R. 78) and then by answer (R. 89) and again by demurrer to the reply (R. 100) challenged the jurisdiction of the United States District Court, on the ground that the action was in reality an action against the sovereign State of Wyoming by a resident and citizen of the State of Utah and that therefore, under the federal Constitution and Statutes, the federal court was without jurisdiction. This contention was sustained by the District Court and the case dismissed.

From that decision the Utah Construction Company took a Writ of Error to the United States Circuit Court of Appeals of the Eighth Circuit, which in an opinion by a divided court, reversed the decision of the District Court and held that the action was against the State Highway Commission of Wyoming and not against the State of Wyoming itself, and that the federal courts had jurisdiction. (R. 126) Thereupon the defendant filed in this Court its petition for a Writ of Certiorari, which in due time was granted by the Court.

Specification of Error

Petitioner relies upon the following specification of error:

The Honorable Circuit Court of Appeals for the Eighth Circuit erred in holding that this action is not an action against the sovereign State of Wyoming, but is an action against a separate and distinct entity, to-wit, State Highway Commission of Wyoming, and that therefore the federal courts have jurisdiction thereof.

Argument

Briefly summarized, petitioner relies upon the following propositions to sustain its contention that the decision of the Circuit Court of Appeals is erroneous and that the District Court of the United States for the District of Wyoming is without jurisdiction to hear and determine the issues involved in this action.

1. The State Highway Commission of Wyoming is merely an arm or agency of the state and in entering into contracts for the building of state highways, it represents the state and is an *alter ego* of the state.

2. This is not only the holding of the courts of last resort but the Supreme Court of Wyoming has expressly so held and its holding should be followed by this Court.

3. The State Highway Commission of Wyoming being an arm or agency of the State of Wyoming, it can not be held personally liable upon any contract entered into by it in behalf of the state, when it has no personal interest in the contract, and this is especially true where the contract itself shows on its face that the state is the real party in interest.

4. Even if the State of Wyoming is not named as a party defendant in this action, yet if it clearly appears that the state is the real party in interest, then the suit is in reality a suit against the state itself and therefore within the inhibition of the Eleventh Amendment to the federal constitution.

5. The State of Wyoming can not either by consent or waiver confer jurisdiction upon the federal courts, where

such jurisdiction has not been expressly given by the federal constitution or the acts of Congress passed in pursuance thereof.

6. The jurisdiction of the federal court in the case at bar is predicated upon diversity of citizenship, but if the State of Wyoming is the real party in interest, then such jurisdiction fails because a state is not a citizen within the meaning of the federal constitution.

7. Even if it be conceded that the State of Wyoming gave its consent to be sued in the federal court by an action against its State Highway Commission, yet that consent was taken away by the Legislature of 1927, and when such consent was withdrawn jurisdiction at once failed.

8. Conclusion.

I.

The State Highway Commission of Wyoming is merely an arm or agency of the State of Wyoming, and in entering into contracts for the building of State Highways it represents the State of Wyoming and is an *alter ego* of the State.

We believe that even the most cursory reading of the constitutional and statutory provisions hereinbefore referred to and which are set forth in full in the appendix to this brief, conclusively demonstrates that the State Highway Commission is but an arm or agency of the State of Wyoming created by the Legislature of that State when the people of the State determined to go into the business of constructing state highways; its contracts are the contracts of the State; the money paid out for the building of said highways is the money of the State of Wyoming, raised by general taxation or the sale of bonds of the State, and

is in the possession and under the control of the State Treasurer. Said funds are not the property of any board or individual.

In his decision, sustaining the demurrer to the petition, District Judge Kennedy makes the following clear analysis of these constitutional and statutory provisions:

> "In the light of this authority in analyzing the issue here, we find that the highway construction over which the controversy arises, was initiated by a constitutional amendment which authorized the State of Wyoming to go into the road building business. The state thereupon proceeded to carry out this new function by creating an agency through which it might efficiently act. It provided for raising money by bonding itself and taxing its inhabitants for the purpose, and providing that such money, as well as that received from other sources, should be accumulated in the hands of its State Treasurer; that its chief legal adviser should be the legal adviser of its agency in the premises; that such agency should maintain its office in the State Capitol; that the state might enter into agreements with the United States for the building of roads, under an Act of Congress, which type of road was here under construction; and directed the manner in which the funds so raised by it should be disbursed, as well as the other incidents which are incorporated heretofore in an analysis of the Wyoming statute." (R. 121)

It is difficult to conceive how any function could be more clearly regarded as the act of the State itself than the building of state highways in Wyoming under the foregoing constitutional and statutory provisions. Then take the statutory provisions in regard to payment for work on state highways. The money in the State Highway Fund is State

funds, and that money can only be drawn out of the State Treasury on warrants issued by the State Auditor. (Wyoming Compiled Statutes, 1920, Section 118.) The State Highway Commission has absolutely nothing whatever to do with any payment for work done under contracts for the construction of state highways. Before any warrant is drawn upon the State Highway Fund by the State Auditor for the payment of such construction work, the voucher must be approved by the State Highway Superintendent. (Section 3034, Wyoming Compiled Statutes, 1920.) But the State Highway Superintendent is entirely independent of the State Highway Commission. Section 3025 of the statutes provides for the creation of a State Highway Department to consist of "a State Highway Commission and the State Highway Superintendent."

This precise question was before the chancery court of the State of New Jersey in the case of Curtis & Hill Gravel & Sand Company vs. State Highway Commission et al., 91 N. J. Eq. 421, 111 Atl. 16. In that case, as in the case at bar, the question before the Court was, "Is a suit against the State Highway Commission a suit against the State itself?" The Court decided it was and dismissed the bill with costs. In its opinion in that case the Court uses the following language, every word of which is equally applicable to the law and facts in the case at bar:

> "That the state highway commission is an *alter ego* of the state, and not a mere subordinate, is so clear as to need little discussion. The statute (P. L. 1917, p. 35, Sec. 1.) created a state highway department, to be governed by a board to be known as the state highway commission. The members of the commission are the Governor himself, ex officio, and eight members appointed by the governor by and with the advice and consent of the Senate. The contracts made

by the commission are clearly contracts of the state; they may be made either in the name of the state or of the commission. The funds expended for its work are the funds of the state, and expended through the usual state channels. The work which it is to do is the construction and maintenance of a state highway system, reaching throughout the entire state and for the benefit of all the citizens, not merely in or for any particular locality or the citizens thereof."

We believe that what was said by the New Jersey Chancery Court could also be said with equal force in regard to the case at bar. The highway built under the contract in this case is a state highway, a federal aid project, paid for out of funds in the state treasury, and it was built for the benefit of all the citizens of the State of Wyoming. Surely the State Highway Commission under such circumstances in making the contract and supervising the construction of the highway was an *alter ego* of the State of Wyoming itself.

II.

The Supreme Court of the State of Wyoming has also held in effect that the State Highway Commission is merely an arm or agency of the State and that its contracts are the contracts of the State itself.

We believe that these decisions of the Wyoming Supreme Court on a question of local law are controlling, and that for this reason the decision of the Circuit Court of Appeals is erroneous and should be set aside. On this proposition see the following cases:

Hjorth Royalty Co. vs. Trustees of University, 30 Wyo. 309;

Franzen vs. Southern Surety Co., 35 Wyo. 15.

In the Hjorth Royalty Company case suit was brought against the Board of Trustees of the University of Wyoming to quiet title to a certain piece of land, which had been granted to the State of Wyoming by the federal government for the benefit of the University. The Supreme Court held that the suit was a suit against the State of Wyoming and laid down the following rule of law:

> "A suit against a department of the state government or a board or corporation created by the state for governmental purposes, is a suit against the state."

In the case of Franzen v. Southern Surety Co., supra, the facts were that on June 1st, 1922, the State Highway Commission of Wyoming had entered into a contract with the firm of Fitzgerald Bros. for the building of a portion of a state highway located in Albany County. In compliance with the provisions of Section 329 of the Wyoming statutes, the contractors gave a bond with the Southern Surety Company as surety, conditioned for the faithful performance of the contract and "to pay all just claims for all work or labor performed and material furnished in the execution of the contract." Thereafter, Franzen who had furnished materials to the contractors for which he had not been paid, brought an action on the bond.

It will be noted that in the above case, as in the case at bar, there was a contract for the building of a state highway, and no doubt it was executed on the same printed form that was used in the present case, as the contract here sued on was executed on June 3, 1922, just two days later than the contract in the Franzen case.

In its decision the Wyoming Supreme Court makes the following statement which shows clearly the position of the Wyoming courts:

"Section 329, supra, deals with bonds in connection with contracts made by public officials under the control of the state. The contract in this case was let by one of the departments of the state itself. We are unable to see why the state may not let its own contracts upon any conditions, of benefit to the public, which it deems fit to impose, or why the Legislature should not have the power to require the agents of the state to let such contracts only upon such conditions. No authority to the contrary has been called to our attention."

Thus it will be seen that the Wyoming Supreme Court says that the State Highway Commission is "one of the departments of the state itself." If one of the departments of the state, then its contracts are the contracts of the State of Wyoming, and the next statement in the Court's opinion would naturally follow, "that the State may let its own contracts upon any conditions it sees fit to impose."

Here is the construction of a Wyoming statute by the Wyoming Supreme Court, and in accordance with well established rules of procedure the federal courts should follow such construction, and should hold that your petitioner is a department and agency of the state and that the contract sued on in this case is the contract of the State itself. See

Barnum v. Okolona, 148 U. S. 393;
Bacon v. Insurance Co., 131 U. S. 258;
Townsend v. Todd, 91 U. S. 452.

Counsel for respondent have attempted to distinguish the above cases and argue that the statement quoted from the Franzen case is mere dictum, but we submit that any analysis of the case will show that it was a point necessary to be decided under the facts in that particular case, and that therefore, it is something more than dictum.

Counsel also contend that even if the Hjorth case and the Franzen case are to be taken as laying down the rule for which they are here cited, still they are not binding on the federal courts, for the question here is one of jurisdiction. We are unable to follow counsel in this argument. Certainly, if the Wyoming courts hold under the provisions of the Wyoming statutes that the contracts made and entered into by the State Highway Commission are the contracts of the State itself, they are deciding a question of local law and not a question of jursidiction, as counsel would have us believe. And when a suit is brought in the federal courts upon such a contract, the federal court in deciding the question of whether this action is an action against the State of Wyoming and therefore beyond its jurisdiction, must follow these decisions of the Wyoming Supreme Court and must hold that the contract here sued on is a contract of the State itself, and that, therefore, a suit against the State Highway Commission on such contract is a suit against the State of Wyoming itself.

III.

The State Highway Commission being an arm or agency of the State of Wyoming, it can not be held liable upon any contract entered into by it in behalf of the State when it has no personal interest in such contract.

In its opinion the Circuit Court of Appeals held in effect that although the contract here in question was entered into by a state agency for the construction of a state highway, to be paid for by the State of Wyoming out of funds in the State Treasury, yet, since the agency was in the nature of a board or commission, created by statute, and not a natural person, such commission was personally liable on the

contract. It is conceded in its opinion that the members of the commission would not be personally liable, had they been made parties, because their acts were official and not of a personal character. (R. 136.)

With all due deference to the Court of Appeals, it is respectfully submitted that the Court either misunderstood or misapplied the authorities cited in its opinion in support of the above statement. The members of the Commission did not act as individuals, either officially or otherwise, in regard to the contract sued on. It was the Highway Commission that acted in the execution of this contract and its acts were official and not of a personal character. As said by Chief Justice Marshall in the case of Hodgson v. Dexter, 1 Cranch 345:

> "It is too clear to be controverted that where a public agent acts in the line of his duty and by legal authority, his contracts made on account of the Government are public and not personal. They enure to the benefit of, and are obligatory on, the Government; not the officer."

Now, it is too clear to admit of argument, that under this rule of law, if the Governor or State Treasurer of the State of Wyoming had been authorized by law to execute contracts for the construction of state highways, the costs of which were to be paid by the State of Wyoming, and they had executed such contract in behalf of the State, the Governor or such other officer could not be held personally liable on such contract, nor could any suit be maintained against such officer on said contract. But if this be true of a natural person as agent, it must also be true of every other agent, whether that agent be a corporation, a Board or a Commission authorized to act for and in behalf of the State.

The case of Astoria Marine Iron Works v. United States Shipping Board Emergency Fleet Corporation, 295 Fed. 415, 417, cited in the opinion of the Circuit Court of Appeals is practically on all fours with the case at bar and is an authority against rather than in favor of its decision. In that case, action was brought by the plaintiff against the defendant corporation to recover $188,000.00, alleged to be due on a contract between plaintiff and defendant. The contract recited that it was made between the Astoria Marine Iron Works, party of the first part, and the United States Shipping Board Emergency Fleet Corporation, representing the United States of America (hereinafter called the owner) party of the second part. The hulls referred to in the contract and which were to be built by the plaintiff did not belong to the defendant corporation, but were the property of the United States, and the money to be used in payment on the contract was the money of the United States regularly appropriated by act of Congress, etc.

Under this state of facts, the Court overruled the demurrer to the answer and held that:

> "The defendant is not in my judgment liable personally on the contract so made any more than the President would have been if he had made it himself. It is an established rule of law that where a public officer or agent acts in the line of his duty and by legal authority, he is not responsible on any contract he makes in that capacity, and when his contract or engagement is concerned with a subject fairly within the scope of his authority, it shall be considered to have been made by him officially and in his public character, unless the contrary appears by satisfactory evidence of an absolute and unqualified engagement to be personally liable, although such contract may be under his hand and seal."

It will be noticed that in the above case it was disclosed on the face of the contract, that the Emergency Fleet Corporation, although it was the person executing the contract, entered into that contract in behalf of the United States of America. In the case at bar, also, the contract on its face discloses that the State Highway Commission of Wyoming, the person executing the contract, was acting for and in behalf of the State of Wyoming, the real party to the contract. If the reasoning of Judge Bean in the above case is correct, and the decisions of this court cited by him uphold him in his position, then, in the present case, the defendant Commission cannot be held personally liable on this contract.

The fallacy of the reasoning of the Circuit Court of Appeals may be shown as follows: Suppose that instead of designating the State Highway Commission and giving it power to enter into contracts for the construction of State Highways, the legislature had seen fit to designate an individual, as for instance, the Secretary of State, to exercise the powers conferred by the State Highway Act upon the State Highway Commission. According to the opinion of the Court of Appeals, an action would lie against the Secretary of State on such contract and yet according to the same opinion he would not be personally liable thereon.

This Court has also announced the same doctrine in the case of Belknap v. Schild, 161 U. S. 10.

We respectfully submit that in entering into the contract for the construction of the Wind River Canyon State Highway and in supervising the construction of said highway, the State Highway Commission acted in the line of its duty under authority conferred upon it by law; that the contract discloses on its face that it was made in behalf of the State of Wyoming; and that the Commission had no personal interest in said contract, which was a public contract enuring to the benefit of the State and all its citizens.

IV.

Even if the State of Wyoming is not named as a party defendant to this action, yet if it clearly appears that the State is the real party in interest, then the suit is a suit against the State itself and within the inhibition of the Eleventh Amendment to the Federal Constitution.

Before taking up and discussing the authorities upon which we rely to sustain the above proposition, we wish again to call the Court's attention to the contract which is the basis of this action. That contract specifically designates the State of Wyoming as the contracting party and the State Highway Commission as its agent. Both in the opening paragraph and in the testimonium clause, we find these words used in describing the party of the first part to that contract, *"The State of Wyoming, acting through its State Highway Commission."* (R. 71, 74)

Not only is the State of Wyoming named as the contracting party, but it is also the person who is obligated by said contract to pay for the work that was to be done under said contract. Paragraph II of said contract provides that on performance of the contract by the Utah Construction Company, the "State of Wyoming shall pay and the Contractor shall receive and accept as full compensation for everything furnished and done by the Contractor under this contract * * * the prices stipulated in the proposal." (R. 72)

This is an action upon a contract and it is elementary law that an action on a contract will lie only against those who are named as parties to that contract, and who are obligated to perform its terms and conditions.

However, in spite of the fact that the State of Wyoming is named in the contract as a party thereto, the Utah Construction Company in its suit on this contract did not make

the State a party defendant, but brought its action against the State Highway Commission, the agent which entered into this contract in behalf of the State.

But even if the State of Wyoming is not named as a party defendant to this action, the courts will look through form to substance and ascertain whether the action, though nominally against a state agency, is not in reality an action against the State of Wyoming itself. This Court has uniformly held that where an action has been brought against an officer or agency of the State to compel him or it to pay out money on the State's obligations, or to carry out contractual obligations, or to do any affirmative act which affects the State's political or property rights, the action is one in effect against the State, and that the State should be regarded as the real party defendant though not named as such in the pleadings.

In the matter of the State of New York, 256 U. S. 490, this Court, speaking through Mr. Justice Pitney, says in regard to this class of cases:

> "The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts."

The Court further said in the above case, that this class of cases extended to such also *as would require the state to make pecuniary satisfaction for any liability.*

And in the case of Hopkins v. Clemson Agricultural College, 221 U. S. 636, this Court speaking through Mr. Justice Lamar, said:

> "With the exception named in the Constitution, every state has absolute immunity from suit. Without

its consent, it can not be sued in any court, by any person, for any cause of action whatever. And, looking through form to substance, the 11th Amendment has been held to apply, not only where the state is actually named as a party defendant on the record, but where the proceeding, though nominally against an officer, is really against the state, or is one to which it is an indispensable party. No suit, therefore, can be maintained against a public officer, which seeks to compel him to exercise the state's power of taxation, or to pay out its money in his possession on the state's obligations, or to execute a contract, or to do any affirmative act which affects the state's political or property rights." (Authorities).

And this is the rule as announced not only by this Court but also by the Supreme Court of Wyoming and all appellate courts. Among the many cases announcing this rule are the following:

Hagood v. Southern, 117 U. S. 52;
Louisiana v. Jumel, 107 U. S. 711;
Ex Parte Ayers, 123 U. S. 443;
Louisiana v. Steel, 134 U. S. 230;
Fitts v. McGhee, 172 U. S. 516;
Murray v. Wilson Distilling Co., 213 U. S. 151;
Pennoyer v. McConnaughy, 140 U. S. 1;
Smith v. Reeves, 178 U. S. 436;
Lankford v. Platte Iron Works Co., 235 U. S. 461;
In Re State of New York, 256 U. S. 490;
Stanley v. Schwalby, 162 U. S. 255;
Belknap v. Schild, 161 U. S. 10;
Cunningham v. Railroad Co., 109 U. S. 446;
Hjorth Royalty Co. v. Trustees of University, 30 Wyo. 309;

State ex rel. Evans v. Field, 27 N. M. 384;
United States v. McCallum, 281 Fed. 834;
McDowell v. Fuller, 169 Mich. 332; 183 Mich. 639.

In the case of Hagood v. Southern, supra, an action was brought against Hagood as Comptroller General of the State of South Carolina and the State Treasurer of South Carolina to compel them to do and perform certain acts looking toward the payment of certain certificates of indebtedness of the state, which were owned and held by the plaintiffs. This Court in the course of a very elaborate discussion lays down the principles that should govern in deciding whether an action brought against an officer or agency of a state is in reality a suit against the state itself. As many of the Court's remarks have peculiar application to the facts in the case at bar, we will quote quite extensively from the opinion:

> "These suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such, if it chooses; and except with that consent it could not be brought before the court and be made to appear and defend. And yet it is the actual party to the alleged contract the performance of which is decreed; the one required to perform the decree and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject matter of the suit, and defending only as representing the State. And the things required by the

> decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit; and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States."

To the same effect is the opinion in the case of Louisiana v. Jumel, supra, where a similar action had been begun in the Federal courts against the State Auditor, State Treasurer and the Board of Liquidation of the State of Louisiana.

In the case of Smith v. Reeves, supra, the action was against the Treasurer of the State of California to recover from him the amount of certain taxes theretofore paid.

The State Treasurer represented by the Attorney General of the state, demurred to the complaint upon various grounds, and also moved to dismiss the case upon the ground that the Circuit Court had no jurisdiction of the defendant or of the action. The motion to dismiss was denied but the demurrer was sustained, and the plaintiff refusing to plead further, the action was dismissed.

It will be noticed that the Circuit Court entertained jurisdiction of the case and dismissed the bill. The Circuit Court of Appeals held that the Circuit Court erred in holding jurisdiction but it affirmed the order of dismissal upon the ground that the Circuit Court had no jurisdiction to take cognizance of such a case as was there presented. This Court approved the action of the Circuit Court of Appeals and affirmed its judgment, holding that the Circuit Court had no jurisdiction. In its opinion, this Court says:

"Is this suit to be regarded as one against the State of California? The adjudged cases permit only one answer to this question. Although the state, as such, is not made a party defendant, the suit is against one of its officers as treasurer; the relief sought is a judgment against that officer in his official capacity; and that judgment would compel him to pay out of the public funds in the treasury of the state a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the state for the amount specified in the complaint."

In the case of Ex Parte Ayers, supra, Ayers, who was Attorney General of the State of Virginia, had been imprisoned for contempt by the United States Circuit Court for disregarding an order of that court enjoining and restraining him from bringing certain suits as commanded by an enactment of the Legislature of Virginia. He brought habeas corpus proceedings in this court, and this court made an order discharging him from custody. Mr. Justice Matthews, in the course of a very exhaustive opinion in which the former decisions of the court were reviewed, used the following language, which when applied to the facts in the case at bar, would seem to be decisive against the jurisdiction of the federal court:

"The inference is, that where it is manifest upon the face of the record, that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the state, which alone is to be affected by the judgment or decree, the question then arising, whether the suit is not substantially a suit against the state, is one of jurisdiction."

and the Court further added that the Eleventh Amendment to the Constitution must be held to cover

> "not only those suits brought against a state by name, but also those against its officers, agents, and representatives, where the state, though not named as such, is nevertheless, the only real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates."

The Ayers case was one of the earlier cases before this Court in which this doctrine was announced, and the Court discussed at length the reasons for the rule. It says:

> "The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several states of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other states or aliens, or that the course of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover not only suits brought against a state by name, but those also against its officers, agents and representatives, where the State, though

> not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

Now, in the case at bar, if any judgment should be obtained by the Utah Construction Company, while nominally such judgment would be against the State Highway Commission, yet such judgment would operate only against the State of Wyoming, for if such judgment was ever paid, it would be paid by the State. In fact, this is conceded by the Circuit Court of Appeals when it says:

> "The Commission is the sole defendant; it has no property, no power of taxation, no means of discharging a judgment, should one be recovered against it. In that event, it will be entirely optional with *the state* as to what, if anything, it will do in the premises." (R. 136)

Petitioner respectfully submits that if the State of Wyoming is the party which must ultimately pay the judgment in this action, if a judgment be obtained, then it is the real party defendant, within the interpretation of the rule as announced in the above cases.

We would be content to submit this phase of the question upon the above decisions of this Court were it not for the fact that respondent in the lower courts and in its brief filed herein in resistance to the application for writ of certiorari, has attempted to distinguish those cases from the case at bar. It says that we overlook the "difference between a state officer acting for the state and a juristic entity created by the state for the purpose of expressly performing, in its own name, a certain state and county function."

As this precise question has not been considered in any of the foregoing cases from this Court, we wish briefly to call the attention of the Court to the following state decisions which are directly in point upon this question:

State ex rel. Gordon v. State Board of Control, 85 W. Va. 739;

Carpenter v. Railway Co., 184 N. C. 400;

Mullen v. Regents of Education, 42 S. D. 171.

In the case of State ex rel. Gordon v. State Board of Control, supra, the facts were very similar to the facts in the case at bar. That was an action brought by Gordon against the State Board of Control and the Warden of the state penitentiary to compel them to apportion and deliver to Gordon the number of convicts that it had contracted to give him. In discussing the question as to whether or not this was an action against the state itself, the Court said:

> "Although the state is not made a defendant *eo nomine*, it is, nevertheless, a proceeding against the state. The contract is made by and between the respondents, 'the State Board of Control, a public corporation acting for the State of West Virginia.' Thus by the very terms of the contract, the state is shown to be vitally interested in it. The State Board of Control is but the state's agent, and acted in making the contract for and in behalf of the state. A state can contract only through its constituted officers or agents. The purpose of the writ in this case is to compel the Board of Control to carry out the state's contract as made by said board, and is therefore, virtually a suit against the state, because the Board of Control is not interested in the contract otherwise than as the state's agent. Hence to compel it to perform the contract would be in effect to compel the

> state to do so. * * * The proceeding being one against the state's contracting agency, brought for the purpose of enforcing a contract made by it on behalf of the state, is therefore virtually a suit against the state itself, and cannot be maintained."

It will be noticed that in the above case as in the case at bar the contract was made by a state board or commission and it showed on its face that it was made for and in behalf of the state. If the present suit can be maintained on any theory, it is maintainable only on the theory that it is an action to compel the Highway Commission to carry out its contract that it made as a state agency, and to recover damages for an alleged breach of that contract. Thus it is clearly within the scope of the doctrine announced in the above decision, in that it is a "proceeding against the state's contracting agency, brought for the purpose of enforcing a contract made by it on behalf of the state, and is therefore a suit against the state itself."

The case of Mullen v. Regents of Education, supra, was an action brought by the plaintiff against "T. W. Dwight and others as members of and constituting the Board of Regents of Education of the State of South Dakota," to recover an alleged balance due for work and labor done and performed under a construction contract. The cause of action was thus identical with plaintiff's second cause of action in the case at bar, but in that case the contract did not show on its face that the state was a party thereto. The lower court gave judgment for the plaintiff. The Supreme Court reversed that judgment, held that it was in effect a suit against the State and therefore could not be maintained. The Court in its opinion uses the following language, which applies equally to the facts in the case at bar:

> "Title to state-owned educational property in this state is in the state, and not in the board of regents.

> The funds appropriated to pay the contractual obligations of the board of regents in relation to such state owned property are the state's moneys and under direct control of the state through its state auditor and state treasurer. The board of regents, although styled a corporation with certain powers and duties prescribed by statute law, is nevertheless only a state agent having only a nominal interest. They are not personally liable for the fulfillment of their contractual obligations—where not charged with acting unlawfully or in excess of authority. Any judgment that might be rendered in favor of plaintiff in a case like this could effectually operate only against the state funds under the control and in the hands of the state auditor and treasurer. We are therefore of the view that this suit is in essence and fact a suit against the State."

Petitioner respectfully submits that under the above authorities the State of Wyoming is the real party defendant and that this suit is in essence and in fact a suit against the State, and that, therefore, the federal courts were and are without jurisdiction.

V.

The State of Wyoming can not either by consent or by waiver confer jurisdiction upon the federal courts, where such jurisdiction has not been given by the Federal Constitution or Act of Congress.

This proposition is so self evident that we would not refer to it in this brief if it were not for the fact that respondent in its brief filed herein in resistance to the application for writ of certiorari insists that the State of Wyoming by creating the State Highway Commission and giving

it the power to sue and be sued in its own name, has waived its immunity from suit under the provisions of the Eleventh Amendment to the Constitution.

In support of the above proposition petitioner respectfully submits that

(1) The federal courts have only such powers and jurisdiction as have been conferred upon them by the Constitution and the Acts of Congress establishing them.

O'Neill v. Cooperative League, 278 Fed. 737;
Thomas v. University Trustees, 195 U. S. 207;
Bank of Washington v. Arkansas, 20 How. 530.

(2) Consent of parties can never confer jurisdiction upon a federal court, nor can any act of the legislature of any state confer jurisdiction upon a federal court where that jurisdiction does not otherwise exist.

Byers v. McAuley, 149 U. S. 608;
Minnesota v. Northern Securities Co., 194 U. S. 48;
Thomas v. Trustees of Ohio State University, 195 U. S. 207;
Bank v. Calhoun, 102 U. S. 256;
Railway Co. v. Swan, 111 U. S. 384.

We consider it unnecessary to review any of these authorities except the opinion of this Court in the case of Minnesota v. Northern Securities Co., as that opinion completely answers every claim of respondent.

In that case the action was originally filed in the state court but was removed to the United States Circuit Court, which heard the case on its merits and rendered a decree dismissing the bill. The case was then brought to this Court on appeal and after the case had been argued and briefs submitted, this Court asked the parties to submit further briefs upon the question as to whether the Circuit

Court of the United States could take cognizance of the case upon its removal from the state court.

In response to the suggestion of the Court, both parties submitted briefs in which they agreed that the federal court had jurisdiction and that the case was a removable one, and both sides insisted that this Court should consider and decide the questions involved upon their merits.

Thus, if a state may waive immunity from suit under the Eleventh Amendment and by consent confer jurisdiction upon a federal court, the State of Minnesota certainly did so in the above case. It not only appeared in the federal courts generally, but it also formally consented that this Court should hear and decide the case on its merits.

This Court, however, held that "consent of parties can never confer jurisdiction on a federal court" and that the Circuit Court was without jurisdiction, because a state is not a citizen, and it remanded the case to the Circuit Court of the United States for Minnesota with directions to that Court to remand it to the state court from which it had come.

VI.

If the State of Wyoming is the real party in interest in this action, then the grounds of jurisdiction as set forth in plaintiff's petition fail, because a State is not a citizen within the meaning of the Federal Constitution and the Acts of Congress.

The above proposition is conclusively established by the following authorities:

Postal Telegraph Co. v. Alabama, 155 U. S. 482;
Minnesota v. Northern Securities Co., 194 U. S. 48;
Ames v. Kansas, 111 U. S. 449;
Stone v. South Carolina, 117 U. S. 430;
Germania Ins. Co. v. Wisconsin, 119 U. S. 473.

However, the respondent has tried to avoid the force of the above doctrine by naming the individual members of the State Highway Commission and alleging that "the said persons constituting the said Highway Commission of Wyoming, and the said Commission, is each a resident and citizen of Wyoming." (R. 3)

Respondent in support of its contention relies upon the case of Thomas v. Board of University Trustees, 195 U. S. 207, and this case is cited in the majority opinion of the Circuit Court of Appeals. (R. 136) That case, however, is clearly distinguished in the dissenting opinion of Judge Scott. (R. 138) It can also be further distinguished from the case at bar in this: The Board of Trustees of Ohio State University was not only empowered "to have the general supervision of all lands, buildings and other property belonging to said college, and of receiving by gift, devise or bequest moneys, lands and other properties for its benefit", but in addition thereto, in that case, the facts were that certain lands were in the possession of this Board, and the Board as a Board claimed ownership thereof. The plaintiff brought an action for the partition of those lands and sought to have the title adjudicated as preliminary to the partition. The trial court found that the land belonged to the Board of Trustees of the Ohio State University. In that case, also, the question of the suit being a suit against the State of Ohio was not raised in any manner, nor was the Eleventh Amendment in any way referred to. The action had reference solely to lands the alleged title to which was in the Board of Trustees. The Board alone was the party in interest. Petitioner respectfully submits that the Thomas case is not an authority in point in this case, because of the difference in the facts of the two cases, but that this case is controlled rather by the decision of this Court in Murray v. Distilling Co., 213 U. S. 151.

In the latter case, two cases were consolidated for hearing, the other being Murray v. The Fleischmann Company. The bill of complaint in The Fleischmann Company case is set forth in full in the opinion of the Circuit Court of Appeals, 164 Fed. 1. It there appears that the case was entitled,

> "The Fleischmann Company, Complainant, v. W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, Constituting the State Dispensary Commission of the State of South Carolina, and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, Individually, Defendants."

The bill of complaint rested the jurisdiction of the federal courts upon an alleged diversity of citizenship of the parties, and it contained the allegations that each of the individual defendants was a citizen and resident of the State of South Carolina, and that the complainant was a resident and citizen of the State of Ohio, thus complying with the rule as announced by this Court in the Thomas case so that the jurisdiction of the Circuit Court "sufficiently appeared as far as the pleadings were concerned."

Such being the facts as shown by the pleadings, what did the courts do? The trial court found for the plaintiffs, and the Circuit Court of Appeals affirmed its decree, but when the case reached this Court, it looked through form to substance and saw that the State was the real party defendant, instead of its agent, the State Dispensary Commission, the nominal defendant, and held that the federal courts were without jurisdiction, because the suits were in effect suits against the sovereign state of South Carolina and thus were within the inhibition of the Eleventh Amendment to the Federal Constitution.

The following quotation from the opinion of the Court in the Murray case is very significant and persuasive when applied to the facts as they appear in the case at bar:

> "We could not, therefore, sustain the exercise of jurisdiction by the circuit court without in effect deciding that the state can be compelled, by compulsory judicial process, to perform a contract obligation. It is certain that, at least by indirection, the bills of complaint sought to compel the state to specifically perform alleged contracts with the vendors of liquor by paying for liquor alleged to have been supplied."

What is the case at bar but an attempt to compel the State of Wyoming to perform an alleged contract and to pay the Utah Construction Company for work and labor alleged to have been done and performed under that contract? It is admitted that the defendant Commission has no funds, no power of taxation and no means of paying any judgment.

VII.

Even if it be conceded that the State of Wyoming gave its consent to be sued in the federal courts by an action against the State Highway Commission, yet that consent was taken away by the Legislature of 1927, and when such consent was withdrawn, jurisdiction at once failed.

As has been heretofore shown, the Wyoming State Legislature in 1927 passed an Act amending Section 3025 of the Statutes, so as to provide that the State Highway Commission may be sued in the Wyoming courts "and in no other jurisdiction upon any contract executed by it."

It was admitted by respondent in the District Court and also in its brief filed in the Circuit Court of Appeals that the State Highway Commission is merely a state agency ex-

isting for governmental purposes, and that as such agency, it could not be sued except as provided in the statute creating it. But if the State Highway Commission is so far an arm or agency of the State of Wyoming that the legislature of that state can prescribe the courts where and the terms and conditions under which it may be sued, then it is so far an arm or agency of the state that the state may withdraw at any time the consent given, or hedge it about with new terms and conditions. There can be no other conclusion from the authorities. Hence the Legislature of 1927 had the right to prescribe in what courts the Commission might be sued.

As has been shown, the State of Wyoming created the State Highway Commission as an arm or agency of the state itself. It is not a body corporate, nor has it any status in any court except such as has been given it by the statute creating it. It is neither a natural nor an artificial person. It is not even a legal entity, except in so far as it is made such by statute. Certainly when the Wyoming State Legislature of 1927 provided that said Commission could be sued only in the state courts and in the courts of no other jurisdiction, it violated no contractual rights of the plaintiff.

It is elementary that a law providing that the State may be sued in certain cases or in certain courts is not a contract, and that such a law may be modified or repealed even while an action which has been brought under such law is pending. See the following cases:

Beers v. Arkansas, 20 How. 527;
In re Ayers, 123 U. S. 443;
Hans v. Louisiana, 134 U. S. 1;
Ex Parte State, 52 Ala. 235;
Railroad Co. v. Tennessee, 101 U. S. 337;
Railroad Co. v. Alabama, 101 U. S. 832;

Baltzer v. North Carolina, 161 U. S. 240;
South Carolina v. Gaillard, 101 U. S. 433;
In re McCardle, 7 Wall. 514;
McDowell v. Fuller, 169 Mich. 332, 183 Mich. 639;
Ball v. Halsell, 161 U. S. 72.

We will not review any of these authorities. This question is exhaustively discussed by this Court in the cases of Beers v. Arkansas and Railroad Co. v. Tennessee, supra, and the reasons for the rule stated. The case of McDowell v. Fuller, supra, is more nearly parallel to the case at bar than any of the cases decided by this Court, but that case is reviewed on Pages 43 to 45 of our brief accompanying the petition for certiorari and will not again be reviewed here.

Conclusion

On Pages 46 to 50 of our brief accompanying the petition for certiorari filed herein, it was shown that the majority opinion of the Circuit Court of Appeals is self contradictory. The argument therein contained will not be here repeated, yet we wish again to call the Court's attention to the fact that the Circuit Court of Appeals ignored the plain provisions of the Act creating the State Highway Department (Session Laws of Wyoming, 1919, Chapter 132) and also ignored all the provisions of the original contract which designated the parties to that contract (R. 71 to 75) and bases its decision upon the fact that in the Supplemental Agreement (R. 75) the original contract is referred to as one entered into "between the State Highway Commission of Wyoming and the Utah Construction Co."

Now, a supplemental agreement by its very nature does not in any way destroy or abrogate the original contract,

but merely supplements the same,—adds something thereto. The two must be read together so as to get the entire agreement, and if there is anything that appears contradictory therein, that construction must be given which will harmonize them and give effect to every phrase and clause.

The original contract recites that the State of Wyoming was acting through the State Highway Commission, the contract was signed by the State Highway Commission and its seal attached, and such being the facts there is no question but that the contract was entered into between the "State Highway Commission of Wyoming and the Utah Construction Company", as recited in the first paragraph of the supplemental agreement, but it was entered into by the State Highway Commission as agent acting for and in behalf of the State of Wyoming.

Another fact that is very persuasive but that has been referred to only incidentally in the foregoing argument is the fact that the road to be built under this contract was and is a federal aid project. At the very beginning of the contract (R. 71) we find the words, "Fed. Aid No. 118", and Paragraph 1 of the contract expressly provides that said road is to be constructed "under the direct supervision of the State Highway Commission, subject to inspection at all times and approval by the Secretary of Agriculture, pursuant to the Act of Congress approved July 11, 1916, entitled 'An Act to Provide that the United States shall Aid the States in the Construction of Rural Post Roads and for other Purposes' ". (R. 72)

Federal aid in the construction of highways was not given by the above Act of Congress to individuals, or to any arm or agency of the State, but such aid is given to the States and the States alone. This fact shows conclusively that the highway here in question was built by the State of Wyoming, that the contract for its construction was the contract

of the State of Wyoming and any suit on that contract is a suit against the State of Wyoming, however it may be entitled.

For the reasons hereinbefore set forth, petitioner respectfully submits that this action is an action against the sovereign State of Wyoming, and that, therefore, the United States District Court for the District of Wyoming was and is without jurisdiction; and that the judgment of the Circuit Court of Appeals for the Eighth Circuit should be reversed and set aside and the judgment of the District Court affirmed.

Respectfully submitted,

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Appendix

The following are those portions of the Wyoming Compiled Statutes of 1920 which have a material bearing upon the questions under discussion:

"Section 3025. There is hereby created a state highway department to consist of a state highway commission and a state highway superintendent. The said commission shall consist of five state highway commissioners, who shall biennially elect their chairman. The said commissioners shall be appointed by the governor by and with the advice and consent of the senate and each shall serve for the term of six years. * * * The commission shall maintain offices in the state capitol which shall be in charge of the state highway superintendent. The commission shall have the power to sue in the name of the 'State Highway Commission of Wyoming,' and may be sued by such name in any Court upon any contract executed by it. The attorney general shall be the legal advisor of the commission and shall prosecute and defend all actions and appear in all proceedings in any federal department in which the commission shall be a party or be interested. The commission shall have a seal bearing the words 'State Highway Commission of Wyoming, Official Seal.''

"Section 3026. The Commission shall appoint a State Highway Superintendent, with a salary to be fixed by the Commission, payable in equal monthly installments. He shall be experienced and skilled in highway and bridge construction and maintenance; shall be allowed his actual and necessary traveling and other expenses incurred in the discharge of his official duties, and shall give his entire time to the duties of his office. Before entering upon the duties

of his office he shall take the constitutional oath of office and give bond to the State of Wyoming in such amount and with such surety as may be approved by the Commission, conditioned upon the faithful discharge of his duties and his accounting for all property, material and records in his control. Under the supervision of the Commissioner he shall have complete charge of laying out and establishing highways upon which any portion of the State Highway Fund is to be expended, except on those highways constructed, improved or maintained in co-operation with the Secretary of Agriculture of the United States under Section eight of the Act of Congress or other Federal Act or Acts specifically authorizing the use of Federal Funds to build roads within or partially within the national forests, and with the approval of the Commission shall purchase all materials, supplies and equipment, including road building machinery, materials, supplies and equipment, and shall employ such engineers, superintendents and employees with salaries to be approved by the Commission, as may be necessary for the proper performance of the duties of the Commission and the construction work undertaken by it."

"Section 3027. All road and bridge construction work, any part of the cost of which is paid from the state highway fund shall be performed in accordance with the plans and specifications prepared by the state highway superintendent and approved by the commission, and shall be performed by or under contracts awarded by the commission, and the state highway superintendent shall have complete charge thereof, except on those highways constructed, improved or maintained in co-operation with the secretary of agriculture of the United States under section eight of the act of congress or other federal act or acts specifically authorizing the use of federal funds to build roads within or partially within the national forests."

"Section 3028. It shall be the duty of the state highway commission from time to time to designate public highways to be known as state highways, which may coincide in whole or in part with country roads theretofore legally established, and whenever such state highway shall be defined and designated by resolution duly entered in the minute record of the said commission, the title and interest of the respective counties, in so much of the road and right of way as shall be so designated shall pass to and vest in the state of Wyoming."

"Section 3029. Excepting as such work may be performed in cooperation with the secretary of agriculture of the United States as hereinafter provided, the construction and maintenance of all state highways, including all bridges, and culverts thereon, shall be performed at the expense of the state and by and under the supervision of the commission and the state highway superintendent."

"Section 3031. The legislature of the state of Wyoming, hereby assents to the provisions of the act of Congress approved July 11th, 1916, entitled 'An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes,' together with all acts and legislation amendatory thereto or supplementary thereto or which shall grant or authorize aid for the construction, improvement, maintenance or repair of public roads or highways. The state highway commission is hereby authorized to enter into all contracts and agreements with the United States government relating to the construction and maintenance of roads under the provisions of the said act or acts of congress to submit such scheme or program of construction or maintenance as may be required by the secretary of agriculture and to do all other things necessary fully to carry out the cooperation contem-

plated and provided for by the said act or acts, for the construction or improvement of highways under the said act, the good faith of the state is hereby pledged to make available funds sufficient to equal the sums apportioned by the state by or under the United States Government during each of the years for which federal funds are appropriated by section 3 of said act, and to maintain the roads so constructed with the aid of funds appropriated and to make adequate provisions for carrying out such maintenance. * * * If the road to be improved under such cooperative agreement is a state highway, the state's share of the expense shall be borne entirely by the state."

"Section 3034. There is hereby created a fund to be known as the state highway fund, to the credit of which the state treasurer, who is hereby designated as the state official to receive all amounts paid by the United States under the said act of Congress approved July 11, 1916, shall place all moneys heretofore received for said fund, all money hereafter received from the United States, under cooperative agreements as hereinbefore authorized, all money derived from taxes levied for such purpose or appropriated for said fund, all moneys received from the sale of state bonds for highway construction or improvement, all money received from the counties under cooperative agreements as hereinbefore authorized, and all other moneys received from donations or bequests which may be accepted by the commission on behalf of the state of Wyoming, or from any other source designated by law for that purpose. All moneys in said fund shall be available for the purposes of this chapter without further appropriation and no warrant shall be drawn thereon excepting on voucher approved by the state highway superintendent."

"Section 3035. Appropriation. There is hereby appropriated to the state highway fund in the state treasury not otherwise appropriated, the sum of three hundred thousand dollars which shall be made available upon the passage of this chapter, and the additional sum of three hundred thousand dollars which shall be available on March first, 1920."

"Section 3020. For the purpose of providing funds for the construction and improvement of public roads and highways in Wyoming, the state treasurer, with the approval of the governor is hereby authorized from time to time within the limits of the amount authorized by law to issue and dispose of bonds of the State of Wyoming to be designated as highway bonds."

"Section 3021. Such bonds shall bear date and may be issued in such amounts and bearing such rates of interest * * * as shall be determined by the governor and state treasurer. * * * They shall be signed by the governor and attested by the secretary of state under the seal of the state and countersigned by the state treasurer."

In 1927, Section 3025 of the Wyoming Compiled Statutes, 1920, supra, was amended and re-enacted so as to read as follows: (Ch. 61, Sec. 1.)

"Section 3025. There is hereby created a state highway department to consist of a state highway commission and a state highway superintendent. The said commission shall consist of five state highway commissioners, who shall biennially elect their chairman. The said commissioners shall be appointed by the governor by and with the advice and consent of the senate and each shall serve for the term of six years; provided, that upon the passage of this chapter, the governor shall appoint two commissioners for the term of two years, two commissioners for the term of four years,

and one commissioner for the term of six years. One commissioner shall be appointed from each of the following described districts: District No. 1, composed of the counties of Laramie, Albany, Platte and Goshen; District No. 2, composed of the counties of Carbon, Sweetwater, Uinta, Lincoln, Sublette and Teton; District No. 3, composed of the counties of Niobrara, Converse, Natrona and Fremont; District No. 4, composed of the counties of Hot Springs, Washakie, Big Horn and Park; District No. 5, composed of the counties of Sheridan, Johnson, Campbell, Crook and Weston. If any commissioner shall cease to be a resident of the district from which he is appointed, his office shall be vacant; all vacancies from any cause shall be filled by appointment by the governor for the unexpired term. Each of said commissioners shall qualify by taking the constitutional oath of office and each shall receive a salary of six hundred dollars per year and his actual and necessary traveling expenses while away from his home in the performance of the duties of his office, to be paid from the state highway fund hereinafter provided. The commission shall maintain offices in the state capitol which shall be in charge of the state highway superintendent. The commission shall have the power to sue in the name of the "State Highway Commission of Wyoming", and may be sued by such name in the courts of this state and in no other jurisdiction upon any contract executed by it. The attorney general shall be the legal advisor of the commission and shall prosecute and defend all action—and shall also appear in all proceedings in any federal department in which the commission shall be a party or be interested. The commission shall have a seal bearing the words "State Highway Commission of Wyoming, Official Seal," and all copies of all records and other instruments in the office of the commission, certified under

the hand of its secretary with said seal affixed shall be received in any court as prima facie evidence of the original record or instrument."

The following sections of the Wyoming Compiled Statutes of 1920, defining the duties of the State Auditor and the State Treasurer, have also an important bearing on the questions before the court, when taken in connection with the statutes relative to the State Highway Fund:

"Section 118. The State Auditor shall:

First—Audit and settle all claims against the state payable out of the treasury, except only such claims as may be expressly required by law to be audited and settled by other officers and persons.

Second—Draw all warrants upon the treasurer for money.

Third—Express in the body of any warrant which he may draw upon the treasurer, for money, the particular fund appropriated by law out of which the same is to be paid.

Sixth—Keep an account of all debts and credits between the state and the United States, and between the state and every other state, sovereignty, community, officer or person, with whom the state may have dealings, and of any separate fund in the state authorized by law."

"Section 131. The State Treasurer shall:

First—Receive and keep all moneys of the state, not expressly required by law to be received and kept by some other person.

Second—Pay all warrants duly and legally issued by the auditor so long as there are in his hands funds sufficient to pay such warrants; Provided, That his payment for any purpose shall in no case exceed the amount appropriated for such purpose.

Third—Keep a just, true and comprehensive account of all money received and disbursed.

Fourth—Keep a just and true account of each head of appropriation made by law, and the disbursements made under the same.

Fifth—Render his account to the auditor for settlement quarterly, or oftener if required."

"Section 132. The treasurer shall in no case disburse or pay out the state funds except on warrants drawn by the auditor. Any violation of the provision of this section shall be deemed a felony and upon conviction thereof, the perpetrator shall be punished by a fine of not more than three thousand dollars and by imprisonment for not more than five years in the penitentiary."